

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ABBOTT LABORATORIES, et al.,	*	Case No. 17-CV-3095 (CBA)
	*	
Plaintiffs,	*	Brooklyn, New York
	*	July 10, 2017
v.	*	
	*	
H&H WHOLESALE SERVICES,	*	
INC., et al.,	*	
	*	
Defendants.	*	
	*	
* * * * *		

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE LOIS BLOOM
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:	GEOFFREY POTTER, ESQ. TIMOTHY WATERS, ESQ. Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas New York, NY 10036
For H&H Wholesale Services, Inc.:	LAURA BIRGER, ESQ. ALAN LEVINE, ESQ. Cooley Godward Kronish, LLP 1114 Avenue of the Americas. New York, NY 10036

Proceedings recorded by electronic sound recording,
transcript produced by transcription service

Fiore Reporting and Transcription Service, Inc.
4 Research Drive, Suite 402
Shelton, Connecticut 06484 (203)929-9992

1 (Proceedings commenced at 3:51 p.m.)

2 THE CLERK: Civil cause for status conference,
3 docket no. 17-CV-3095, Abbott Laboratories, et al. against
4 H&H Wholesale Services, Inc., et al. Will the parties please
5 state your names for the record.

6 MR. POTTER: Good afternoon, Your Honor. Jeffrey
7 Geoffrey Potter and Timothy Waters for Abbott.

8 MS. BIRGER: Good afternoon, Your Honor. Laura
9 Berger and Alan Levine for the H&H defendants.

10 THE CLERK: The Honorable Lois Bloom presiding.

11 THE COURT: Good afternoon, Mr. Potter, Mr. Waters,
12 Mr. Levin and Ms. Birger. How's everybody today?

13 MS. BIRGER: Very good, Your Honor.

14 MR. WATERS: Good.

15 THE COURT: Can you believe that people would not
16 be prepared for a plea?

17 MS. BIRGER: I was stunned.

18 MR. WATERS: I know Mr. Greenberg. He's a very
19 fine lawyer. I don't know why he had his real estate partner
20 here.

21 THE COURT: You know, again, I know it's off topic,
22 but the Federal Defenders are the best attorneys that we see.

23 So to see somebody who is of modest means hire an
24 attorney and they are not even here -- she surrendered last
25 Thursday.

1 So the idea that on the worst day of her life she
2 doesn't have anybody advising her, again, I'm sure that Mr.
3 Greenberg -- I don't know him at all. But I'm sure that he
4 met with her but still -- anyway.

5 I'm sorry I digress, but that's why we're behind
6 today.

7 MR. WATERS: No, we saw. We were here. We
8 understand.

9 THE COURT: SO this is a status conference in
10 plaintiff's action against H&H and on June 16th, defendant
11 filed a motion to impose a protective order against
12 plaintiffs to exclude from the seized documents those that
13 were turned over to United Lex that don't reference Freestyle
14 marks and plaintiff has now responded.

15 Those are ECF entries 31 and 32.

16 And the plaintiffs are requesting that the motion
17 be denied without prejudice and that the parties be ordered
18 to meet and confer.

19 I held a telephone conference on June 22nd and I
20 denied defendant's motion without prejudice and I did order
21 the parties to meet and confer and, unfortunately, it appears
22 that the parties have not been able to resolve their
23 disputes, and specifically the parties have not been able to
24 agree to search terms and date restrictions.

25 And I was going to be holding this conference by

1 telephone. However, by letter dated July 7th, plaintiffs
2 asked that the conference be held in person.

3 I had my law clerk call to Ms. Berger, or Mr.
4 Levine, to ask if that would be on consent and so we
5 converted it to an in person conference, which I'm glad,
6 because I never got to meet the two of you. I've only heard
7 you as disembodied voices on the phone.

8 So I've gone over the letter requests and I
9 understand, I believe, what is at issue here.

10 And I didn't think that it was going to do a whole
11 lot to tell you to come back at a different time. I think
12 we're going to have the same dispute to resolve no matter how
13 much time goes into it.

14 So I could tell you a couple of things right off
15 the bat, Ms. Birger.

16 That when H&H argues that the 2015 case discovery
17 was restricted to documents related to the importation of
18 FreeStyle strips in 2014, while the 2017 action concerns the
19 alleged importation of domestic counterfeit strips after the
20 injunctions, I'm not really going for those limits. Let me
21 tell you why.

22 The 2015 case wasn't actually limited to 2014. It
23 was before you took over the case and we did a sampling, a
24 random sampling, in the international case.

25 And H&H said that for that one year where we asked

1 for the sampling, that they had 6,000 responsive documents.

2 And so H&H, through its prior counsel, made a huge
3 fuss that it would be unduly burdensome for them to produce
4 every year that everybody else was producing.

5 And so it wasn't that the 2015 case was limited to
6 2014. That was them begging that their client not be put
7 through the ringer and now Abbott, of course, is requesting
8 that there be a more expansive search done.

9 Let me also say that I find it somewhat unrealistic
10 of you to think that whatever they find in the one case is
11 not going to be used in the other case. I don't think there's
12 anything in the rules to support that.

13 I already gave an example at an earlier conference
14 of a case by Magistrate Judge Moses in the Southern District,
15 and I don't see that there's any support for your proposition
16 that if they find something in the other case, that they're
17 not going to be able to use it at the deposition, for
18 instance, of Mr. Goldman.

19 So those two things -- I'm just giving you my
20 inclination off the bat of that just didn't strike me as
21 you're in a strong position to make those arguments.

22 As far as agreeing to search terms and production
23 parameters -- one of the other points -- and let me just make
24 sure, you did get the letter that was filed under seal on
25 July 10th, today?

1 MS. BIRGER: Yes, we did, Your Honor.

2 THE COURT: Okay. I'm making sure, because when I
3 see it's under seal, I get nervous that they may not have
4 seen it.

5 MR. WATERS: We always email those out, Your Honor.

6 THE COURT: Okay. Very good.

7 It seems that there could be an agreement made as
8 to terms, that they weren't going to agree to limit it just
9 to the FreeStyle marks, as you were insisting. It looks like
10 a core concern is Holland Trading.

11 And so, again, I would like to hear some argument
12 on why we couldn't come to an agreement. They're not going
13 to let it be just FreeStyle marks. Holland Trading seems to
14 be a real concern for legitimate reasons.

15 So what can we work out here, Ms. Birger?

16 MS. BIRGER: So there's a couple of things, Your
17 Honor. And just so that you know, we did discuss
18 specifically this issue in an attempt to reach some
19 resolution with Abbott.

20 One thing to keep in mind is the distinction
21 between the seizure order and discovery in this case.
22 And I think that's particularly important to the last point
23 that Your Honor made about Holland Trading.

24 The fact is that the seizure order, as Judge Amon
25 limited it, is to matters that refer or relate to merchandise

1 bearing the FreeStyle marks.

2 So if, for example, there were conversations with
3 FreeStyle about, gee, should we start to do business with you
4 with regard to other products, or products in general, it's
5 actually not within the scope of the seizure order. Full
6 stop.

7 Now, does that mean that it's not a concern to
8 them? They couldn't serve a discovery request under Rule 26
9 and we could have a conversation? No. Of course, not.

10 But that doesn't mean that they're entitled under
11 the seizure order to just take it from our server without us
12 having the opportunity to review and have that conversation.

13 THE COURT: Let me say I can agree with you, but
14 what would be the outcome?

15 If they were to serve the discovery request --

16 MS. BIRGER: Your Honor, we actually told them.
17 We've given them already the Holland Trading documents that
18 we have. That's not the issue.

19 The issue is whether Holland Trading should be the
20 subject of search terms being used for the protective order.

21 And, in fact -- I mean, not for the protective
22 order. For the seizure order.

23 And, in fact, they're not even willing to limit it
24 to Holland Trading, because we asked them with regard to date
25 restrictions. They said well, at least for documents that

1 have to do with Holland Trading we would want to go back
2 earlier.

3 And I said to them we might be able to agree on
4 longer date restrictions for Holland Trading, if, in fact,
5 there was a reasonable date restriction for other documents.

6 And they said oh, no, no. That we don't want to
7 do, but refused to propose a date restriction at all for
8 other documents, but said for Holland Trading they want to go
9 back all the way. And so --

10 THE COURT: Well, again, I'm the one that asked the
11 question, so you should get back on track of what you wanted
12 to present to me.

13 MS. BIRGER: Sure.

14 THE COURT: I follow you that there is a
15 distinction between the seizure order and what would be
16 relevant within discovery context.

17 My question was so what difference would it make?
18 If they have to make a specific request and they know it
19 exists, other than you now winning the victory of the day,
20 what difference would it make in the long run here?

21 MS. BIRGER: There's two differences?

22 One is going forward they're continuing to
23 implement the seizure order. And we think the search terms
24 should be designed to get to what Judge Amon allowed under
25 the seizure order. Documents referring to the FreeStyle

1 marks.

2 That is separate, frankly, from willingness to
3 produce Holland Trading documents. So that is the first
4 thing.

5 THE COURT: As far as implementing the seizure
6 order, the seizure order, in my mind, has already been
7 implemented.

8 MS. BIRGER: And that's just it, Your Honor.
9 It hasn't. They've taken the server. They have all of our
10 documents, but they are continuing to search them, via their
11 vendor, and cull them out and take them.

12 So --

13 THE COURT: And they've produced them to you.

14 MS. BIRGER: Well --

15 THE COURT: The vendor produces them --

16 MS. BIRGER: But that's the dispute we're having,
17 right?

18 THE COURT: Okay.

19 MS. BIRGER: So the dispute is that if we see
20 documents on there -- the difference under the two scenarios
21 that Your Honor presented is under Rule 26, if we said yes,
22 we'll give you documents having to do with Holland Trading,
23 we would do what any party does. We do search terms. We
24 gather the documents. We review for privilege. We turn them
25 over.

1 Under the seizure order, they get to tell United
2 Lex you know what we'd like to see? We'd like to see
3 anything that has to do with -- and this is exactly what Mr.
4 Potter tolw me he's doing. We'd like to see anything that has
5 to do with counterfeit documents. We'd like to see anything
6 that has to do with Holland Trading.

7 And then United Lex runs some search terms. We
8 don't know what they are. We do get to see the documents,
9 but under the current scenario, we have the right to withhold
10 any, other than on grounds of privilege.

11 And so we're not reviewing for responsiveness.
12 We're not reviewing for responsiveness for a document request
13 that tap ins what it is we're supposed to be responding to.
14 That is a practical difference.

15 And since the seizure order is not complete, it is
16 a live thing that is happening on a daily basis, setting
17 parameters for what they're entitled to get that way matters
18 to us, Your Honor.

19 That is fundamentally the difference and that is
20 why it is so important to draw a distinction between the
21 seizure order and discovery.

22 And to some extent this is a tempest in a teapot
23 with regard to Holland Trading because the very first thing
24 they asked for was Holland Trading documents, and they got
25 them, before we first realized that they were getting stuff

1 that didn't refer to FreeStyle marks. So --

2 THE COURT: Well, their argument is that the
3 Holland Trading documents do relate to FreeStyle marks. I
4 know that's going to be their argument.

5 MS. BIRGER: It may be, Your Honor, but the fact
6 is Holland Trading sells a number of products.

7 And so their argument is not that all the Holland
8 Trading documents relate to the FreeStyle marks, but that
9 they think it's important to their claim, because they'd like
10 to establish the length of the relationship with Holland
11 Trading, the nature of the relationship with Holland Trading,
12 how it evolved, long before --

13 THE COURT: Well, again, the argument that was put
14 in the letter that was sent to me said that there is some
15 information in the documents that there was -- prior to the
16 counterfeit there was some relationship and -- between
17 Holland Trading and H&H.

18 MS. BIRGER: That's true.

19 THE COURT: And so, again, they're trying to show
20 when the decision was made, and when they knew that there
21 were counterfeit goods that were being traded.

22 MS. BIRGER: So, again, Your Honor -- and I don't
23 mean to cut you off. I apologize.

24 THE COURT: You're not.

25 MS. BIRGER: Again, Your Honor, then it's

1 important to look at their complaint. And they are saying
2 they want to trace the history because it's relevant to their
3 showing of perhaps willfulness or of how the relationship
4 evolved.

5 But their actual allegations are that the
6 counterfeiting started in reaction to the injunction that was
7 entered in October of 2015 and the first documented instance
8 of any sale is at the very end of 2016.

9 And you may recall our first proposal to Your Honor
10 on the telephone was that the protective order should start
11 at January 1, 2016.

12 In an effort to meet and confer, we have moved back
13 to October 9, 2015.

14 THE COURT: But the argument being -- and again,
15 that they could have amended the original action that they
16 had to supplement to these new allegations against H&H.

17 So they first were investigating the international
18 boxes, and then when they found out that there was, in their
19 mind, counterfeiting going on regarding domestic strips, they
20 could have amended but for -- because they were asking for a
21 seizure order, it wouldn't have been under seal, and it would
22 have exposed your client.

23 If what you're saying is they've now found other
24 things that date back further, they could certainly amend
25 their complaint, Ms. Birger, couldn't they?

1 MS. BIRGER: Of course, they can amend their
2 complaint, and I'm not suggesting that.

3 But I don't think that's what they're saying.

4 THE COURT: Well --

5 MS. BIRGER: I think what they're saying is they
6 found instances of conversations with H&H and Holland Trading
7 about selling product, and that to be fair, the documents
8 they're talking about are H&H making sure that the H&H
9 products are legitimate and being -- the way they're reading
10 them, alert to the idea that there could be counterfeiting.

11 So let's put it in context. It doesn't change the
12 allegations they're making, which is that the counterfeiting
13 starts much later.

14 THE COURT: Mr. Waters, do you want to respond?

15 MR. WATERS: Sure.

16 So, Your Honor, I think in terms of the differences
17 between the seizure order and discovery there's a big issue
18 there that's not being addressed, which is counterfeiters who
19 are subject to an ex parte seizure order can't be allowed to
20 say these documents over here are outside the scope of the
21 seizure order. You can't see them. I won't give you
22 meaningful information about them but trust me, these are
23 outside the scope.

24 And I say that, Your Honor, because we have an idea
25 what these documents are that they're withholding. They

1 still refuse to show it to us. They gave us a log that gives
2 us no information; less information than a privilege log.

3 United Lex, under the seizure order, they are
4 correct. Page 6 of the seizure says United Lex gets all the
5 documents. United Lex does the review. United Lex determines
6 what's related to referring to FreeStyle and they produce
7 those documents.

8 So what we're facing and what this dispute arose
9 from is United Lex made that determination. H&H objects to
10 it. They're objecting to it unilaterally. They're trying to
11 overturn it without giving any information to the court or to
12 us.

13 If United Lex went off the rails, we want to
14 address it, but we can't do it in the blind.

15 THE COURT: So your suggestion was, as was
16 implemented in the other case, that they allow you to review
17 whatever those documents are, but that there not be any
18 waiver of any privilege or any other objection that they may
19 make, but then you wouldn't be in the dark as to what they're
20 withholding.

21 MR. WATERS: Absolutely.

22 If you want to use the Federal Rules, as an
23 example, Rule 26, for inadvertent production. We get the
24 documents. They say it's outside the scope. We sequester.
25 We don't use it, except to resolve the dispute until the

1 dispute is resolved.

2 THE COURT: And why would that not work here, Ms.
3 Birger?

4 MS. BIRGER: Because, Your Honor, the question is
5 what's in the scope and what isn't. And again, keep in mind
6 all we're asking for are search terms.

7 Let's just go back to what Mr. Waters just said
8 about United Lex.

9 Judge Amon did not say I am delegating the power to
10 decide what's within the scope of the seizure order of some
11 vendor.

12 THE COURT: I'm following you.

13 MS. BIRGER: Okay.

14 THE COURT: I understand, but look. You're coming
15 to me and asking me to make a determination, and I'm more in
16 the blind than United Lex is.

17 MS. BIRGER: Your Honor, again, here is the
18 proposal we made the Abbott and I will make it to you. We
19 should be searching for all documents that talk about
20 FreeStyle or all documents that talk about Abbott and let's
21 see where that leaves us.

22 That should get you documents referring or relating
23 to the FreeStyle marks. It's very broad.

24 THE COURT: I don't think that's true. And I'll
25 tell you why.

1 By analogy, since this is all in my mind analogous
2 to a Fourth Amendment search warrant, okay? We frequently
3 get drug deals --

4 MS. BIRGER: This is true.

5 THE COURT: -- where the tapes are not talking
6 about drugs, but are talking about other things.

7 MS. BIRGER: So, Your Honor, for this reason,
8 actually, I suggested that Abbott should propose search terms
9 that they think work, because if, in fact, you think there's
10 a code or something -- the question still remains how to make
11 this work.

12 THE COURT: So I thought that that's what had been
13 proposed, Ms. Birger, and maybe I'm wrong. I thought that
14 there had been counterfeit or any version of counterfeit.

15 I thought that when they asked for there to be
16 something regarding Holland Trading, that's because their
17 best lead is that Holland Trading was involved in the
18 counterfeiting that they're saying H&H has perpetrated.

19 So I thought that in addition to the marks that
20 you're talking about, that those are not not suggestions that
21 in my mind go so far afield from these subject matter of what
22 Judge Amon had allowed.

23 MS. BIRGER: That may be, Your Honor, as to the
24 word "counterfeiting."

25 As to Holland Trading, there would be the

1 intermediate step of if Holland Trading were used, or
2 Holland, or some combination of it as a search term, there
3 still needs to be then a responsiveness to termination like
4 you would do under Rule 26. Does this actually refer to the
5 FreeStyle marks, or let me give you an example
6 hypothetically.

7 Let's say a different company's products were being
8 bought from Holland Trading, not theirs, it would hit on the
9 search terms and they should not see it. They should not see
10 what their competitors are doing with H&H.

11 And so that's where we are asking for some sort of
12 give in play here. There need to be search terms and there
13 need to be some sort of responsiveness review and that's why
14 Rule 26 works better than the seizure order for stuff other
15 than the FreeStyle marks because it solves that problem.

16 Otherwise you have the trouble of if you use Holland
17 Trading as a search term and you come up with documents where
18 one of their competitors is selling product through Holland
19 Trading to my client, that's going to hit on the search terms
20 and they don't want to trust us on withholding it. I
21 understand that. But it's also completely outside the scope
22 of the seizure order.

23 MR. LEVINE: Okay.

24 THE COURT: Yes, Mr. Waters.

25 MR. LEVINE: Your Honor, United Lex says they're a

1 vendor.

2 So if you don't proceed with search terms, then
3 they -- Patterson Belknap is calling the play into its vendor
4 on a continuing basis. We don't know what instructions are
5 being given. There's no record of what they're asking for.

6 And it becomes an open source, if you will, of
7 document discovery that is beyond our review. And a seizure
8 order is very limited legally. It's limited to the language
9 of the order because it creates a seized product like in a
10 search warrant.

11 And I've had lots of search warrants, Your Honor --

12 THE COURT: Your only problem is he wrote that
13 order that Judge Amon signed.

14 MR. LEVINE: I know that. Which is why --

15 THE COURT: That's your problem.

16 MR. LEVINE: Which is why he should be held to the
17 words that he used.

18 And there are by analogy lots of criminal cases
19 where a search warrant is executed against a company and
20 immediately after the search warrant, within a couple of
21 weeks, the government then serves grand jury subpoenas to get
22 specifically documents or information that were beyond the
23 scope of the language of the search warrant. Because the
24 search warrant is -- the government is held to the language
25 of its search warrant.

1 Mr. Potter, now the way he is interpreting this,
2 isn't held to the language of the seizure order. Of, if you
3 will, he's held to the broadest possible reading of it which
4 is not reviewable.

5 THE COURT: Well, ths is the part that you had me
6 on. The part me on was that United Lex is their vendor.
7 That I completely understand. That they are working with
8 their vendor to supply the documents. That I got.

9 But let me just say to you you're moving for a
10 protective order in a -- so we're talking apples and oranges
11 here. Because usually when we're talking a protective order
12 we're talking discovery.

13 In fact, I've done research. There are not
14 protective orders granted under seizure orders. There just
15 aren't. So you're asking me for something in the context of
16 the seizure order where it really is a device to limit a
17 discovery tool.

18 MR. LEVINE: We also asked -- and Ms. Birger can do
19 this -- we also asked in our original filing on this to --
20 there is Section 6(d)11.116 --

21 THE COURT: 116(d)(7).

22 MR. LEVINE: (d)(7)?

23 THE COURT: Yes.

24 MR. LEVINE: Which does allow for limiting the
25 production of documents to confidential --

1 THE COURT: Private, proprietary or privileged.

2 MR. LEVINE: So those --

3 THE COURT: But it doesn't say to relevance.

4 MR. LEVINE: No. But --

5 THE COURT: Does not say to relevance.

6 MR. LEVINE: But we are -- our position is, Your
7 Honor, that the business of H&H would hypothetically with
8 Holland Trading beyond the products is confidential and
9 proprietary to H&H with Holland Trading and beyond the
10 language of the order. And so we are not --

11 THE COURT: I am following what you're saying.

12 MR. LEVINE: -- we are not trying to prevent the
13 discovery ultimately of the documents.

14 We're looking to move the playing field of the
15 dispute about what they get from an environment in which they
16 call the plays and we have no idea what plays they called in.
17 We're just looking at the documents from that environment to
18 one where they ask us to produce something.

19 We do a search. We have a discussion about the
20 language of their request. We asked them over and over again
21 for search terms. They refused to give us proposed search
22 terms.

23 THE COURT: And they say --

24 MR. LEVINE: Their view is, Mr. Potter's view is
25 related and referring means everything.

1 THE COURT: Mr. Levine, I know that you're very
2 passionate and it works well for you.

3 But let me just say, okay, they're saying that they
4 were willing to talk to you about search terms but that
5 you're insisting that the only search term be the marks. And
6 so between the two sides there's an impasse. And my whole --
7 how do I say this tactfully -- I have more cases than just
8 Abbott Labs.

9 MR. LEVINE: We're aware.

10 THE COURT: So I have to get a resolution here that
11 will work. I can't have it be that every day's an Abbott
12 Lab. day.

13 And as much as I know that this is important to all
14 the players, in a certain way you're right. This is just
15 maneuvering. And they're saying you're holding the cards
16 because when you United Lex is giving you the documents,
17 you're not giving them information like you would be required
18 to in a privilege log as to why you're withholding the
19 document. You're just not giving them.

20 MS. BIRGER: Just to be clear, Your Honor, that's
21 not what we're doing. Since the last conference, we actually
22 did generate a log.

23 They think -- what they want to know is they want
24 to see the documents and then decide. But we told them the
25 vast majority at this point that we have been pulling out

1 have been until we resolve the date restriction issue -- and
2 we specifically identified for them by control number -- it's
3 only been withheld because it --

4 THE COURT: Is it really all about the date and not
5 relevance?

6 MS. BIRGER: No. But more than half, probably more
7 than two thirds of the current stuff. Some of the earlier
8 things --

9 THE COURT: Wait. Wait. Wait. Wait. Half or two
10 thirds of the current stuff is being held --

11 MS. BIRGER: Meaning that --

12 THE COURT: -- because of date or relevance?

13 MS. BIRGER: Let me -- yes -- no -- of date -- and
14 the reason why is this.

15 The Holland Trading stuff and other things were
16 front loaded. They told United Lex to prioritize that stuff
17 clearly.

18 And so what we have been doing -- and we have given
19 them a log and we will update it every time -- just pending a
20 ruling from the court or an agreement on what they know what
21 we're doing is we're telling by document by document why we
22 withheld it.

23 And we say very specifically there is no mention of
24 the Freestyle marks anywhere in this document. Or we said
25 this document predates October 9th, 2015 --

1 THE COURT: But I don't buy the October 9th date.

2 MS. BIRGER: Okay.

3 THE COURT: And I'm telling you that right now.

4 That's the date that they filed for the injunction. And
5 it may be a problem with their complaint, but I don't buy
6 that that's the relevant date for purposes of them getting to
7 see documents.

8 MS. BIRGER: So, Your Honor, the issue is this.

9 They're telling us that they'll agree on a date
10 restriction, but it's got to go back several years.

11 And given the theory of their case, which is that
12 something happened after October 9th, 2015 that caused a
13 change in behavior there is zero reason to go back years from
14 that. Even if you go back a few months, Your Honor, you
15 don't go back years. There's nothing. They don't have any
16 instance of any counterfeit sale until December, 2016.

17 THE COURT: Look, can I be very direct with you?

18 MS. BIRGER: You absolutely can.

19 THE COURT: So it seems to me that your client had
20 terrible counsel out of the gate, and that there were
21 representations made both to plaintiff and to the court that
22 have now been undermined by other things that have happened.

23 And so you're fighting on both of these fronts. Ms.
24 Birger. I want to be clear with you about that. You're
25 fighting the big behemoth, Abbott Lab, with Mr. Waters and

1 Mr. Potter, but you're also fighting that your client, H&H,
2 made representations in the other case that it sounds like
3 now have come back to bite them.

4 And so for me I can only go on what I'm being
5 given. If you're saying that half or two thirds of the
6 documents are now being withheld because of the date, I don't
7 know what the date range is that you're withholding anything
8 before that October 9th, 2015. If that's what this is all
9 about --

10 MS. BIRGER: No.

11 THE COURT: Again, I know that they allege that H&H
12 began the counterfeiting conduct in 2015. That's what the
13 complaint says. Mr. Waters, Mr. Potter --

14 MS. BIRGER: They allege it began at the end of
15 sometime in 2016, but that the impetus for it started after
16 October 9th, 2015. That's the allegation, not to interrupt.

17 The only thing -- the only reason I reference the
18 why, Your Honor, is in response to the idea that they have no
19 reason why we're withholding documents. It's simply not
20 true. We told them. And again we've only been withholding
21 them pending a resolution of this issue which we have been
22 pushing and trying to resolve.

23 THE COURT: Except that, Ms. Birger, again, if this
24 was a discovery dispute, you'd be on the losing end of the
25 battle.

1 MS. BIRGER: But it's not, Your Honor.

2 THE COURT: So let them turn it into one and then
3 I'm saying what's the difference?

4 MS. BIRGER: But, Your Honor, they haven't. And
5 that's because they like it the way it is. They like the
6 fact that they have complete control and we have no say in
7 it. They could serve discovery requests.

8 THE COURT: And, quite frankly, if they served the
9 discovery request and you're withholding them based on
10 relevance, what will the difference be?

11 MS. BIRGER: But, Your Honor, the difference is
12 that when you have a discovery request, you don't withhold on
13 the basis of relevance. You object on the basis of
14 relevance. And then you have a meet and confer and you
15 resolve it or you bring a discovery dispute to a judge. You
16 don't have this free-form then going to a vendor dealing with
17 --

18 THE COURT: I understand that.

19 MS. BIRGER: I know we keep circling.

20 THE COURT: I understand that. But I sort of feel
21 that we'll be at the same place.

22 MS. BIRGER: I don't think we would, Your Honor.
23 And obviously we told them. And particularly that you hit it
24 right out of box on the Holland Trading stuff.

25 I think, frankly, given the representation they've

1 made to us that we would be hard-pressed to say to them that
2 Holland Trading isn't relevant. They told us they think that
3 Holland Trading has been selling our client counterfeit
4 goods. So you wouldn't hear that from us. We'd go away,
5 Your Honor.

6 THE COURT: And I don't really understand why H&H
7 would be trying to protect the proprietary information of
8 somebody -- again, I understand it shouldn't be that I'm
9 putting the onus on you.

10 But since it's you moving for the protective order,
11 and since there is no protective order in the regular sense
12 under the federal rules -- and really we're dealing with a
13 section under the seizure order where it says that if it's
14 proprietary information -- but that's why I'm going back to
15 that. Because it doesn't make sense to me that if H&H -- if
16 you're protecting your client and you're going to say they
17 were duped. This other company was selling them things.
18 They had no idea they were counterfeit. Why would you be
19 trying to protect that information?

20 MS. BIRGER: Your Honor --

21 THE COURT: I understand if there's other dealings
22 with Holland Trading and it's not about the Abbott Labs
23 product --

24 MS. BIRGER: That's part of it.

25 THE COURT: -- but if it's in conjunction in the

1 same e-mail that they're talking about three different
2 products, I don't see how you're going to avoid turning it
3 over.

4 MS. BIRGER: So, Your Honor, I agree with you. If
5 it were talking about FreeStyle and something else, then we
6 would have to turn it over. At the very least maybe we'd be
7 having an argument about redactive. But I understand that.

8 That's not what we're talking about here. We're
9 talking about other documents. And, frankly, we're talking
10 about whether it's within the scope of the seizure order for
11 them to get say the genesis of the relationship with Holland
12 Trading.

13 They wrote to Your Honor in this morning's letter
14 that they understand from deposition testimony that there was
15 a dinner at one point between representatives of Holland
16 Trading and representatives of our client.

17 And frankly, Your Honor, e-mails about that dinner
18 don't concern the FreeStyle marks. They don't. And so would
19 they get it in Rule 26? They very well might. They very
20 well might. It's a different issue.

21 THE COURT: Mr. Potter.

22 MR. POTTER: We seem to be arguing about things
23 that just are outside the scope of reality.

24 We now know a little bit, but most of these e-
25 mails have been withheld. That there was an extraordinary

1 meeting with people flying from Europe to Troy, Michigan.
2 One does not go from Europe to Troy, Michigan for any other
3 purpose but to meet with H&H.

4 And they met with the person who was in charge of
5 buying the test strips, and not a person who was at all
6 involved in any other of the products that they claim that
7 they might have possibly, hypothetically, could have
8 considered buying from this Holland Trading Group.

9 And we know there were e-mails because there's just
10 a little bit of information about it. They just refer to
11 them. What is the phrase they use? Client development or
12 client relations. That's all I know.

13 But I assume, because I asked and got no answer,
14 that these e-mails are, in fact, planning this extraordinary
15 meeting --

16 THE COURT: Why does it matter?

17 MR. POTTER: Well, because I want to know who was
18 at the meeting because I'm going to want to have to take
19 depositions. I'm going to want to know who came from Holland
20 Trading. I'm going to want to be able to pull out of that --

21 THE COURT: And how about their point? Why can't
22 you just ask those questions?

23 MR. POTTER: Because when I asked them questions at
24 their depositions -- and I don't have documents -- they lied.
25 We have a long --

1 THE COURT: You haven't taken the deposition yet
2 though. Have you?

3 MR. POTTER: All but I have of H&H.

4 THE COURT: I understand in the other case you took
5 the deposition, not in the 17--

6 MR. LEVINE: I mean, in --

7 THE COURT: No, he didn't interrupt you. You don't
8 get to interrupt him.

9 MR. POTTER: In Mr. Gulaff's (ph), David Gulaff's,
10 I asked him at his deposition --

11 THE COURT: But that was in the 15 case.

12 MR. POTTER: Right. But I asked him who he was
13 buying the international -- who he was buying domestic strips
14 from. And he lied to me.

15 THE COURT: Can I just ask why -- now knowing what
16 I know what you know, why can't you just serve requests on
17 them?

18 MR. POTTER: Your Honor, we're concerned -- because
19 when we served requests in this case, we have not gotten the
20 responsive documents. The work that United Lex has been
21 doing has been very good and it --

22 THE COURT: I'm sure it has.

23 MR. POTTER: Well, Your Honor, but that's the
24 thing. We have gotten documents from them. And in none of
25 those documents can they identify as being outside the scope

1 of the seizure order.

2 THE COURT: Look, Mr. Potter, everybody wishes that
3 they could have a United Lex. Okay.

4 And the only reason why you have a United Lex is
5 because of the type of case that allows for this
6 extraordinary power where the court has ordered them to be
7 the intermediary.

8 But I can assure you that Judge Amon had no idea
9 what search terms or how this would all unfold. She was
10 signing an order that was presented to her in a case where
11 there were allegations of counterfeiting going on and it gave
12 you very broad, extraordinary power to go into H&H and take
13 their server. And from that time forward, it's now my
14 problem. Okay.

15 So both of you are talking about how, you know, on
16 your end of it, Unite Lex is doing a great job. On their end
17 of it, that United Lex is unilaterally making determinations
18 that feeds you everything. Because they're your vendor, they
19 want to be hired again and they have an interest in pleasing
20 you. You didn't say all that but it's --

21 MR. LEVINE: They actually have the information
22 about that dinner from the deposition testimony two weeks ago
23 in a --

24 THE COURT: Who is they?

25 MR. LEVINE: Mr. Abbott has it.

1 THE COURT: Mr. Potter?

2 MR. LEVINE: Mr. Potter asked Mr. Goldman about
3 that dinner. Mr. Goldman testified about that dinner,
4 testified who was at that dinner, testified what that dinner
5 was about. So they actually don't need the documents to find
6 out about that dinner.

7 THE COURT: Well, that was just one example he was
8 saying of why he moved this information.

9 MR. LEVINE: I understand. But it's disappointing
10 to me, Your Honor, that misrepresentations are being made
11 about what the evidence is in the case.

12 THE COURT: Let's not start with that.
13 Misrepresentations is not where you want to go with H&H as
14 your client. Okay. Yes.

15 MR. LEVINE: Your Honor, the TRO in the case
16 provides that in addition to the documents that are produced
17 by United Lex -- and remember this is extraordinary.
18 Congress made findings in passed special legislation to deal
19 with people that sell counterfeits and that's why this is
20 different and that's why there is a United Lex.

21 THE COURT: But remember that we put this off until
22 September to have the hearing. So you have more than enough
23 time that you could make these requests if you don't think
24 that you're getting the information that you're entitled to.

25 MR. LEVINE: Well, we also have -- the court also

1 issued a TRO that requires that these documents be produced
2 by H&H. They haven't been produced by H&H. H&H produced
3 some invoices with Holland Trading, but the e-mails and
4 documents behind it have only come to us through United Lex.

5 So we have -- they had the opportunity to produce
6 the documents. They were required to produce the documents
7 in an expedited timeframe. Obviously, they've had more time
8 to do it. That hasn't worked. We haven't gotten the
9 documents that way.

10 What we have been getting from United Lex are
11 documents that are not only exactly called for by the seizure
12 order -- and I'd like to, if I may, just read into the record
13 the paragraph, the operative paragraph on paragraph 6 of the
14 seizure order to show how broad it is in the seizure order
15 and how descriptive it is in the seizure order itself, that
16 if we pick up these meetings and other similar things that
17 are being held back, even if they don't specifically mention
18 FreeStyle marks on it.

19 And it had been working fine. The problem we're
20 having here --

21 THE COURT: You wanted to read into the record the
22 paragraph.

23 MR. LEVINE: Yes.

24 THE COURT: You wanted to read into the record
25 paragraph 6.

1 MR. LEVINE: "Ordered that United Lex may review
2 all documents, communications, computer files and electronic
3 data seized pursuant to this order, to identify documentation
4 relating or referring in any manner to the manufacture,
5 promotion, publicity, advertising, receiving, acquisition,
6 importation, return, shipment, purchase, sale, offer for sale
7 for distribution of any merchandise bearing the FreeStyle
8 marks on a rolling basis, and shall provide those documents
9 to counsel for H&H."

10 And then there's a procedure for review of things
11 on the basis of privilege.

12 And all of the documents we've received not only
13 meet that criteria in a very narrow way, but they're also
14 relevant, it turns out, almost every one of them to the
15 actual counterfeiting itself.

16 And as we now are starting to piece together in the
17 few documents we have is that H&H had a constant
18 communication with Holland Trading and rejected their product
19 that were not stated in writing, but stated over telephone
20 calls based on the e-mails we should have a call about that
21 up until the time of the court's order being entered.

22 We think that if we can go through and see these
23 documents they will help us show and prove that this
24 counterfeiting was done willful. This is a --

25 THE COURT: Can I just stop you for one second?

1 ECF number 10 is an expedited discovery order that
2 says the parties may immediately serve discovery requests and
3 that there had to be an expedited response. This was when we
4 still thought that we were going forward on the expedited
5 basis to the hearing.

6 Why can't we employ some discovery to meet this
7 need instead of arguing today, tomorrow, the next day, about
8 the terms and whether you're getting what you're supposed to
9 get?

10 MR. POTTER: Your Honor, my concern is given the
11 history of discovery in this case -- and this is something
12 that Congress thought about in passing this legislation -- is
13 that we cannot rely upon H&H to make production.

14 THE COURT: Let me just say H&H was represented by
15 different counsel --

16 MR. POTTER: They still are represented by that
17 counsel. They are counsel of record. They attended the
18 deposition. They are on the telephone calls. They're not
19 here today.

20 THE COURT: But let me just say to you because this
21 has now been put off for some time, the urgency that you're
22 coming, the frequency and the urgency that you're coming to
23 me about the case doesn't seem to serve the parties well.

24 I do understand, Mr. Potter, what your argument is;
25 that they did not produce what they were supposed to produce.

1 And that again you're saying that the seizure order affords
2 for a much broader production than they believe it does.

3 I also understand that because United Lex took the
4 server that you have no problem getting the documents from
5 United Lex. You only have a problem because there's a
6 process by which it has to go through Ms. Birger and Mr.
7 Levine's hands so they're holding up the documents.

8 I got the whole gist of what is going on here. My
9 problem here is I understand that it's an extraordinary
10 mechanism that Congress has put into hands of plaintiffs like
11 your clients.

12 But I also understand that by putting off any
13 hearing on that TRO until September, that that built in a
14 little more time for the parties to get at whatever it is
15 that they need to get at here.

16 You already have enjoined them from selling any of
17 the product. They're not getting any more product to put on
18 the market. So the urgency that they may be flooding the
19 market with counterfeit goods in your client's name has been
20 forestalled.

21 So my real question to you is if we can't get the
22 parties to agree on terms, knowing that Ms. Birger is making
23 the argument to me that if this was made as a discovery
24 request they wouldn't have any legs to stand on. She said
25 that. She didn't say it that way.

1 MS. BIRGER: Not quite that way, Your Honor.

2 THE COURT: But she said if you had made the
3 discovery request for all the documents relating to the H&H
4 client relations with Holland Trading --

5 MR. POTTER: Well, she said she'd object to it, and
6 then wed be back here.

7 THE COURT: But she wouldn't get anywhere with me.

8 MR. POTTER: Okay.

9 THE COURT: She wouldn't get anywhere with me.

10 Her one point that is well taken with me, but I
11 have nothing I can do, is that protective orders are not
12 generally written about in this realm and in the realm of a
13 seizure order.

14 And it's probably because the seizure orders are
15 going to be put to the test through the hearing in a very
16 short period of time.

17 And so these sort of arguments back and forth just
18 don't happen with any frequency, because either the company I
19 guess has shut down after the seizure and they put their
20 hands up or they just are not moving for -- there are no
21 cases on protective orders within this area of a seizure
22 order.

23 So I guess it doesn't help or hurt you in any way.
24 I'm just saying that they're asking for something that I
25 don't find any basis for in the case law.

1 But on the flip side, I understand their argument
2 that there is a difference between discovery and seizure.
3 And what you're entitled to in the seizure may or may not be
4 everything that United Lex is making this determination is
5 within the scope. I don't know. I haven't looked at any of
6 the documents.

7 So I could do a couple of things. I could force
8 you to go back to the table after this conversation where
9 they know that I'm not going hold up that date. I don't know
10 what the right date is, but I'm not going to hold up that
11 date as the right date, the date that you filed.

12 Two, I've already said that I believe that the e-
13 mails or the relations between H&H and Holland are fair game
14 and that they shouldn't be throwing up roadblocks and saying
15 that they want to protect the confidentiality of that.
16 Because I think that that -- even though it may in some
17 respects have more basis in 15 United States Code 1116(d)(7)
18 because that refers to confidential, private, proprietary or
19 privileged information. I really can't see why they would
20 want to protect somebody who's selling them counterfeit
21 goods.

22 But that being said, my inclination is to throw you
23 back to each other to get this worked out in a way that there
24 are search terms built in that both sides may not be happy
25 with, but could agree to.

1 You don't think it's going to work, Mr. Waters?
2 That's what your face says.

3 MR. WATERS: The difficulty is is the documents
4 that are being withheld.

5 What we can agree would not get picked up on search
6 terms because all they are are discussions about the stuff
7 that's coming.

8 So until we could see these documents, know what it
9 is, understand their relevance, and we can do other search
10 terms that would pick up similar documents and things like
11 that --

12 THE COURT: So what do you think? We're going to
13 raid as a search term "the stuff"?

14 MR. POTTER: No, that's the problem. Because the
15 way it works, Your Honor, when you or I are reviewing our own
16 documents on line, you start broad and you say, my goodness,
17 there's now a series of transactions here. And you look to
18 see the e-mail dealing with the transactions.

19 You've got deliveries and you say, oh, my goodness,
20 these are deliveries are going through such and such a
21 freight forward, are located in Florida. And then they're
22 setting up escrow payments and other discussions of getting -
23 - how we're going to get this stuff cleared through customs,
24 so on and so forth. This is all about the same transaction.

25 And what we assume is going on with United Lex is

1 they are doing -- as we told the court they would -- in real
2 time figuring out what these transactions are and providing
3 their documents.

4 As far as we know, those are the documents that are
5 being held up. If we can see the documents that they're
6 holding on the grounds of relevance, we can figure out where
7 this has gone wrong if, in fact, they're not part of
8 (indiscernible). And these are not privileged documents.
9 These are issues of relevance.

10 We're happy to enter into any sort of protective
11 order so we can understand what it is that we're trying to do
12 here. If we just say documents that use the magic word
13 FreeStyle we're not going to pick it up and we know that.

14 MS. BIRGER: Your Honor, Mr. Potter just made our
15 argument for why this should be done under Rule 26. Because
16 when parties are served with discovery requests, they start
17 broad. They look at their own documents. They talk to their
18 client. They find the relevant documents. They turn them
19 over.

20 The problem is --

21 THE COURT: Ms. Birger, I assume that all of the
22 documents that you have gotten from United Lex will
23 ultimately have to be turned over.

24 MS. BIRGER: I'm not sure that's quite right.

25 THE COURT: Maybe it isn't.

1 MS. BIRGER: Many of them may be withing the scope
2 of Rule 26, but there are documents that are not about
3 Abbott.

4 MR. POTTER: Your Honor, we need to see those
5 documents so we can know what's wrong. We'll look at a
6 written copy in their office.

7 This is a seizure order. They are unilaterally
8 refusing to let us see documents seized on their say so.
9 Their log is a joke. It didn't have the date of the document
10 or anything else.

11 THE COURT: And I just ask though -- so these have
12 been produced since May on a rolling basis.

13 How much more is there to be produced?

14 Again, I'm asking in quantity, because a server
15 could have unlimited amount of information on it and this has
16 been produced since May. Am I correct? Since May there's
17 been --

18 MS. BIRGER: Yes, Your Honor.

19 THE COURT: There's been rolling documents.

20 MS. BIRGER: Yes.

21 And, Your Honor, the answer from our perspective is
22 we don't know because what's happening -- and, again, this is
23 the problem is that when Mr. Potter and Mr. Waters have a new
24 theory, a new idea, a new lead, they go back to United Lex
25 and United Lex is doing something and then a new rolling

1 production comes out.

2 THE COURT: But I don't really care about that, Ms.
3 Birger. And what you're telling me on both sides is putting
4 me in the position that now you're going to produce all the
5 documents to me and then I'm going to say whether or now they
6 should be turned over, and God knows that's not what I want
7 to do.

8 MS. BIRGER: Nobody wants to impose that on you,
9 Your Honor, but I'm trying to forthrightly tell the court,
10 because we don't know what they're looking for and they've
11 been unable in our meet and confer to come up with search
12 terms, because as Mr. Potter just candidly acknowledged, he
13 wants what he wants. But he can't define it and he wants to
14 keep going back to the well and poking around and looking for
15 things.

16 But on the flip side of that argument is only
17 because this has come up in a seizure context, where it's
18 their vendor that's getting the documents and turning them
19 over to you, if it was you looking for the very same
20 documents, you wouldn't have -- I said a leg stand on.

21 MS. BIRGER: Your Honor, we wouldn't be filing.

22 THE COURT: You would not have a reasonable basis
23 to be withholding them.

24 So, again, I'm saying why then are we going through
25 this exercise in futility?

1 MS. BIRGER: And the answer is this, Your Honor.
2 The answer is this. There is a certain lack of trust. I
3 understand Abbott's lack of trust of my client, but
4 similarly, Mr. Potter and Mr. Waters have sued my client on
5 behalf of many other clients, not just Abbott, over the
6 years.

7 And so there is a reluctance to turn over documents
8 that are not responsive to document requests with letting
9 them have free access. That's it, Your Honor.

10 THE COURT: And Ms. Birger, if you looked at -- and
11 I don't know how many there are, but let's assume there are a
12 hundred documents, just to have a round number.

13 MS. BIRGER: There's fewer, but yes.

14 THE COURT: Okay. If you were to look at those
15 hundred documents and tell me that you're not turning over 20
16 of them because they don't have anything to do with FreeStyle
17 and they're about H&H dealing with other companies, or other
18 brands, or other merchandise, I could accept that.

19 But that's not what you're saying.

20 MS. BIRGER: That's not. I'm telling you there are
21 some documents that fit that description and then there are
22 other documents about say setting up a dinner with Holland
23 Trading, which we do not talk about the FreeStyle marks and
24 we think they're outside the scope of the seizure order.

25 If there was a Rule 26 request for all documents

1 concerning communications with Holland Trading, we would have
2 turned them over.

3 THE COURT: A Rule 34 request, not Rule 26, right?

4 MS. BIRGER: Sure. Sure.

5 THE COURT: 34. Why can't we just do that?

6 MR. POTTER: Sure. We will run into problems if we
7 go 30 days out and we get objections, because then we won't
8 have the documents in time for the hearing, but we'll deal
9 with that at the time.

10 THE COURT: I thought the hearing's in September.

11 MS. BIRGER: It is.

12 THE COURT: And we're in July now. So if my 30
13 days is right -- and you have to admit, I've given you quick
14 access to the court if there's any problem to resolve.

15 MR. POTTER: Yes, Your Honor.

16 THE COURT: And I do have a good memory. Nothing
17 else, but a good memory.

18 So I will remember today's conversation.

19 MR. POTTER: And we appreciate that, Your Honor.

20 THE COURT: The expedited discovery order, by the
21 way, says a three-day turnaround.

22 And, again, I'm not saying that we should go under
23 the expedited discovery order, because the expedited
24 discovery order was done in light of the fact that the
25 hearing was going to be held expeditiously, and now it's been

1 put off until September.

2 But you see I think that the amount of energy
3 that's going into this is not a good use of the H&H dollar.

4 Again, I understand that they already made their
5 bed a little bit before you and Mr. Levine came in, so I
6 can't make anything for them about that, the mistrust between
7 the parties.

8 But I am in the position to say that I don't think
9 you're going to be able to hold onto the documents --

10 MS. BIRGER: We understand.

11 THE COURT: -- because it's talking about a dinner,
12 when there's other information that they have that that
13 dinner was somebody coming from Europe to meet with somebody
14 in Troy, Michigan about buying test strips.

15 I don't think you're going to be able to --

16 MS. BIRGER: We understand, Your Honor. We
17 understand. And you will not see us back in this courtroom
18 on a discovery request about those documents.

19 I also have a good memory, and I know the court
20 does, and you just heard me say that.

21 THE COURT: Okay. Good. Yes, Mr. Waters.

22 MR. WATERS: So, Your Honor, I'll just point out
23 page 5 of the seizure order already has a -- basically a
24 document request.

25 It's an order for them to produce documents on

1 their own related to FreeStyle. So that's already there.
2 That's already an obligation. They simply put that process
3 on hold during this dispute. I think it's time for them to
4 take it off hold and start producing those documents.

5 Anything not covered on page 5, then we can discuss
6 --

7 THE COURT: Again, I'm not looking to make more
8 paperwork for your minions. I'm not.

9 And I understand that part of the argument is
10 whether it's related, or referred to, or any of that,
11 because, again, the dinner with the person from Europe, I
12 don't know if there are specific emails that you're really
13 interested in that don't say a thing about FreeStyle and you
14 still would want that email.

15 So what I'm trying to say here is I think the
16 writing on the wall, Mr. Levine and Ms. Birger, that your
17 client is not going to be able to withhold these documents.

18 I get your point about the unilateral, you know,
19 Unitex -- United Lex. God, I'm coming up with new names.
20 Not a bad one.

21 MS. BIRGER: I think Unitex is actually a company.
22 I feel like they make gloves or something.

23 THE COURT: Maybe.

24 But I understand what your point is that they
25 shouldn't have the extraordinary power just because Judge

1 Amon signed a seizure to just feed everything to Mr. Waters
2 and Mr. Potter.

3 But I think that you're in a -- you're in a bit of
4 quicksand here on the argument that you're not going to have
5 to eventually turn these documents over.

6 I don't think there's going to be any argument down
7 the road, if they make these requests under 34 that
8 documents, emails and they already have your listing of them.

9 So I understand that you think it's a horse of a
10 different color because of the distinction between the
11 seizure and discovery, and I do understand that there's a
12 live implementation of the seizure order still going on.

13 And I've asked both sides how much more is there
14 and nobody is able to tell me that. Is there a --

15 MR. POTTER: Our sense is there's very little. The
16 amount that they've produced so far, in terms of physical
17 document --

18 THE COURT: Is there a way that we would ask United
19 Lex to tell us, since they have the server and that way I
20 have a better understanding of whether or not we are fighting
21 over a limited universe of documents, or it's going to keep
22 going.

23 MR. WATERS: Your Honor, part of the problem here
24 is we haven't told United Lex -- (indiscernible) says
25 FreeStyle, dump it on us. And then they get how many

1 thousands of documents and they have to review it for
2 privilege.

3 We've explained -- we've said this to Judge Amon
4 the first day. We explained our theory of the case. We
5 think Holland Trading's the counterfeiting so, of course,
6 they look for Holland Trading related FreeStyle documents.

7 If we were to say give us every document that says
8 FreeStyle Abbott on it, then we'd have a huge dump.

9 I guess we can do that, but we haven't been going
10 that route. We've been trying to be targeted so that we don't
11 just capture every document on the server.

12 THE COURT: But both of you are telling me the same
13 thing, Mr. Waters. That you have not given them search terms
14 because you haven't been able to agree to search terms.

15 And you're saying it would be too broad, and
16 they're saying that's the only -- or least your letter is
17 saying that's the only search terms that they'd agree to, is
18 that it has to have the FreeStyle mark.

19 And I'm saying I don't know what the answer is, but
20 I think that there is a way to run around the backhand here,
21 to do a forehand stroke, which is to serve the document
22 request --

23 MR. WATERS: Okay.

24 THE COURT: -- since you already have the list of
25 what they have. They've already said that they understand and

1 will remember that I'm not going to uphold them --

2 MR. WATERS: Got it.

3 THE COURT: -- from turning over those documents.

4 But I would like if there's any more that's going
5 to come up regarding the seizure order, I would like
6 something, whether it's an affidavit or it's you getting the
7 information from your company, United Lex, that I know what
8 are we dealing with here, because, again, I'm not saying that
9 you haven't come to me on a worthwhile basis.

10 Both sides are using my time judiciously. I don't
11 have any problem with both sides coming to me.

12 I do have a problem though because I'm in the dark.
13 I don't know how many more documents they have to dump or how
14 much more information. I've given you clear indication that I
15 would not restrict it the way that you would want me to
16 restrict it. That date is not going to be the operative
17 date.

18 And as far as the distinction, which I do
19 understand the argument and I did my own independent research
20 and did not find any cases regarding protective order and
21 seizures.

22 And I believe that's because usually the seizure
23 order is quickly put through to a hearing and here's a delay
24 that's been agreed to by the parties.

25 That's the only thing that I can really come up

1 with here.

2 MR. LEVINE: Your Honor, if they were in the nature
3 of Rule 34 requests, then both sides would know what
4 documents are being sought and there could be a professional
5 discussion about what's produceable and what's not.

6 And if Your Honor --

7 THE COURT: But Mr. Levine, it's not going to be a
8 relevance objection.

9 MR. LEVINE: I understand.

10 THE COURT: And so all of these documents that are
11 listed in -- I forget whether it's Exhibit A or whatever the
12 attachment was to the letter today, the likelihood is you're
13 not going to be able to withhold those and object.

14 MR. LEVINE: Your Honor, I hear Your Honor.

15 THE COURT: Okay.

16 MR. LEVINE: But the fact of the matter is that we
17 don't know what the limits of the word "relevance" are now
18 and we don't know what the limits are of Mr. Potter's and --
19 request.

20 And so we've heard the court --

21 THE COURT: Well, I --

22 MR. LEVINE: We understand --

23 THE COURT: I also --

24 MR. LEVINE: We understand what the court --

25 THE COURT: -- I also do not want to make you give

1 another log because then we're going to be fighting about the
2 log instead of getting the documents.

3 So look. I'm not going to their end result, which
4 is give them all the documents without waiving any of your
5 objections and let them come and be able to argue. I'm not
6 jumping to that.

7 But I'm also giving you as clear an indication as I
8 can that if they're making these requests and you're
9 withholding them because you don't think they're relevant,
10 that will not be upheld.

11 And so I'm saying -- and I do understand and I want
12 to say to Mr. Waters and Mr. Potter so Mr. Levine, and Ms.
13 Birger, I think you acknowledge are worthy opponents on a
14 case like this.

15 And if you had a client like H&H and you came in
16 when they came in on the case, they have to be able to do
17 something to put their finger in the dike.

18 And so, again, I believe that their argument that
19 the seizure order did allow for everything to be seized, but
20 it didn't give United Lex full, unfettered discretion about
21 everything gets turned over to Mr. Potter and Mr. Waters.
22 That's why the documents first go through Mr. Levine and Ms.
23 Birger. That's what the seizure says.

24 And I'm saying that I'm not going to be able to
25 withhold their relevance objection, but I also know, because

1 we have this on file, expedited discovery order, which I am
2 telling you you should negotiate because a three day
3 turnaround doesn't seem to be fair and in everybody's
4 interest.

5 But I don't think that we have to keep fighting
6 about it as the seizure order, unless somebody's going to
7 tell me that there is some imminent danger right now to the
8 public, and that it must be that everything that was seized
9 gets turned over immediately for you to view in order to
10 protect the public. Nobody's telling me that.

11 I think that we can handle it as a discovery
12 dispute and if they made the same protective order
13 application in a discovery dispute on the basis of relevance,
14 I'd be able to deny their motion.

15 MS. BIRGER: We're find with that.

16 MR. LEVINE: Thank you, Your Honor.

17 THE COURT: So I guess I'm just kicking the can
18 down the road, but I'm giving you both indications of where
19 the court would come out and especially on the date, I've
20 been clear with you, that I do not agree that the date of the
21 filing is the date.

22 And I've also told you that the 2015 case wasn't
23 actually limited to 2014. It was that H&H in their random
24 sampling had 6,000 documents from 2014 so we didn't believe
25 that they needed to turn over the rest at that time.

1 THE COURT: Is there anything else that needs to be
2 addressed on behalf of Abbott today?

3 MR. WATERS: No, Your Honor. We'll promptly serve
4 the discovery requests and we will be talking to our
5 adversaries about the timing of objections and then
6 responses.

7 THE COURT: And, again, I don't think that -- I
8 don't think there's going to be a different result, but to
9 fight about search terms, just doesn't sound to me to be an
10 efficient use of our resources at this time.

11 Anything else on behalf of H&H today?

12 MS. BIRGER: No, Your Honor.

13 THE COURT: This matter is adjourned. Thank you.

14 MR. WATERS: Thank you.

15 (Proceedings concluded at 4:55 p.m.)

16 I, CHRISTINE FIORE, court-approved transcriber and certified
17 electronic reporter and transcriber, certify that the
18 foregoing is a correct transcript from the official
19 electronic sound recording of the proceedings in the above-
20 entitled matter.

21

22



23

July 18, 2017

24

Christine Fiore, CERT

25

Transcriber